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No. 83-1347

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

UNIGARD INSURANCE COMPANY,
Petitioner,

vs.

FORMICA CORPORATION and
AMERICAN CYANAMID COMPANY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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DATED: March 14, 1984

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QUESTION PRESENTED

Petitioner Unigard Insurance Company has failed to present any question of significance to this Court. The question posed by Unigard in its Petition raises no issue at all, but is merely an attempt to frame an issue of interest to this Court, where none otherwise exists. Indeed, respondents agree with Unigard that a federal court with jurisdiction over an action on the basis of diversity of citizenship may not disregard controlling state law. The dispute in this case is whether the particular state court decision upon which Unigard relies is controlling or apposite. Thus, if any question is raised by the Petition for Writ of Certiorari, it is whether this Court should disturb the conclusion of the district court in ascertaining and applying state law, given the deference normally accorded to a district court judge in a diversity cases in ascertaining the law of the state in which he or she sits.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings below remain as petitioner or respondents in this proceeding.

Subsidiaries and affiliates of petitioner Unigard Insurance Company are unknown to respondents.

Respondent American Cyanamid Company is the parent company (with 100% ownership) of respondent Formica Corporation. The remaining subsidiaries (other than wholly owned subsidiaries) and affiliates of respondent American Cyanamid Company are: Agustin A. Balaguer & Cia., Ltda.; Arizona Chemical Company; Arizona Chemical Overseas Corporation; Arizona Chemical Service Corp.; Bartley Coaters Limited; B. Braun—Dexon GmbH; B.

Braun—Dexon, S.A.; Brewster Phosphates (a Partnership); Burford Fertilizers Limited; The Catalyst Company (a Partnership); Ceresdale Fertilizers Limited; Chemacryl Plastics Limited; Colfax Laboratories (India) Private Limited; Cyanamid Fothergill Limited; Cyanamid Iberica, S.A.; Cyanamid India Limited; Cyanamid Italia S.p.A.; Cyanamid-Ketjen Katalysator B.V.; Cyanamid (Pakistan) Limited; Cyanamid (Portugal) Limitada; Cyanamid Taiwan Corporation; Cyanamire S.r.l.; Cyanenka S.A.; CYRO Industries (a Partnership); Cysol (a Partnership); Cytogen Corporation; Esterfarm Laboratori Farmaceutical S.r.l.; Societe Anonyme Formica; Formica Espanola S.A.; Formica GmbH and Co. KG (a limited Partnership); Formica Plastics Pty. Limited; Hopewell International Company Ltd.; Kent County Fertilizers Limited; Laboratorios Layre Limitada; Laminate Industries (Proprietary) Limited; Lederle (Japan), Ltd.; Lederle (Nigeria) Limited; Les Engrais Chimiques Levis Limitee; Les Engrais Chimiques Victoria Limitee; Les Engrais Saint-Gregoire Inc.; Mitsui-Cyanamid Limited; Molecular Genetics, Inc.; Ralph Dale Fertilizers Limited; Sherkat Sahami Cyanamid-KBC; Skyway Fertilizers Limited; Societe des Aiguilles Suturex (S.A.R.L.); Societe des Sutures Chirurgicales; Sutumex, S.A. de C.V.; Takeda Italia, S.p.A.; TDF Tiofine B.V.; Tiofine Pigmente GmbH; United Insurance Company; and, YuHan-Cyanamid, Inc.

The subsidiaries (other than wholly owned subsidiaries) and affiliates of respondent Formica Corporation are: Societe Anonyme Formica; Formica Espanola S.A.; Formica GmbH and Co. KG (a limited Partnership); and Formica Plastics Pty. Limited. In addition, all subsidiaries

and affiliates of American Cyanamid Company are affiliates of Formica Corporation.

There are numerous other subsidiaries owned wholly by American Cyanamid Company, Formica Corporation, or a combination of the two.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondents Formica Corporation and American Cyanamid Company respectfully pray that this Court deny the Petition of Unigard Insurance Company for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

Unigard Insurance Company ("Unigard") sued Formica Corporation ("Formica") and American Cyanamid Company ("Cynamid") to recover approximately $633,000 (together with attorneys fees and costs) which it paid in

settlement of four claims against Formica and Cyanamid. Two of those claims were the subject of a personal injury lawsuit filed in the United States District Court for the Northern District of Nebraska ("Smith action"). The other two claims ("Ljunggren claims") were settled without suit being filed. (These four claims will sometimes be referred to collectively as the "Nebraska claims".)

Unigard contends that Formica and Cyanamid were negligently responsible in whole or in part for the injuries out of which the Nebraska claims arose. Unigard interprets its policy as not insuring Formica and Cyanamid for their own negligence. Based on that interpretation, Unigard asserts that the factual issue of Formica's and Cyanamid's possible negligence must be resolved before any legal conclusion can be drawn regarding coverage under the Unigard policy. The issue of respondents' negligence has never been tried, however, since the district court disagreed with Unigard's interpretation of the policy.

The district court interpreted Unigard's insurance policy as a matter of law, holding that regardless of their possible negligence, Formica and Cyanamid are insured under the policy, and that therefore, Unigard is precluded as a matter of law from recovering from Formica and Cyanamid. The Court of Appeals for the Ninth Circuit affirmed the judgment in favor of Formica and Cyanamid. Viewed as simply as possible, this is a case in which the lower courts interpreted an insurance policy in favor of the insured.

Contrary to Unigard's characterization, there is nothing atypical about the handling of this case by the Court of Appeals for the Ninth Circuit. While the Ninth Circuit's

decision is brief, that brevity is obviously not the result of any lack of consideration by the Ninth Circuit, but of that court's conclusion that Unigard's arguments are directly contrary to well-established California law regarding the interpretation of insurance policies.

Neither the Ninth Circuit, nor the district court, refused to apply controlling California case law in deciding this diversity case. On the contrary, the Ninth Circuit decision is expressly based on holdings of the California Supreme Court. (See Appendix A to Petition for Writ of Certiorari.) More importantly, the record is clear that the district court, in granting summary judgment, considered and distinguished the precise California case law upon which Unigard bases its Petition. (See Appendix E to the Petition for Writ of Certiorari.) In the absence of a controlling state court decision, the district court did exactly what it was required to do—it looked to the Ninth Circuit's interpretation of California law in analogous situations and to the law of other jurisdictions which have dealt with the issue. *See Lewis v. Anderson,* 615 F.2d 778 (9th Cir. 1979), *cert. denied,* 449 U.S. 869 (1980); *Liberty Mutual Insurance Co. v. United States Fidelity & Guaranty Co.,* 232 F.Supp. 76, (D.Mont. 1964); 1A Moore's Federal Practice, § 0.309[2] at p. 3124 (1978). Thus, there is no error for this Court to correct.

Factual Background

1. The Nature of the Nebraska Claims

The Nebraska claims involve injuries suffered by the Smiths and Mr. Ljunggren in an accident which occurred

in January of 1975 while they were using a product known as "Formica Brand Brushable Contact Adhesive #140" ("Formica #140"). The primary contentions of the Smiths' Complaint were as follows:

(a) That Formica #140 was highly inflammable and explosive and was inherently dangerous;

(b) That the danger of Formica #140 was so great that the product should not have been available to the general public;

(c) That Formica #140 was not properly tested before it was made available to the general public; and,

(d) That Formica #140 was inadequately labeled with the result that users were not adequately warned of the extreme danger of the product.

The Complaint in the Smith action sought damages of $6 million.

2. The Roberts-Formica Contract for the Manufacture of Formica #140

At the time of the accident, Formica #140 was being manufactured by, among others, Roberts Consolidated Industries ("Roberts"), pursuant to a contract entered into between Roberts and Formica in December of 1969. The contract ("Roberts-Formica contract") related to the manufacture, packaging, labeling and distribution of Formica #140 and contained the following provisions:

(1) Shipments of Formica #140 were to be made directly from Roberts to Formica's customers.

(2) Roberts warranted that Formica #140 would conform to certain *performance* specifications.[1]

(3) Roberts agreed to package and label the Formica #140 in accordance with specifications in the contract and in accordance with Formica's further written instructions, if any. The contract provided that "[Formica's] label instructions shall be limited primarily to artwork and the precautionary statements on the label shall be suggested by [Roberts], subject to [Formica's] approval; provided that [Formica's] approval shall not relieve [Roberts] of its responsibility for said statements as hereinafter set forth."

(4) Roberts represented and warranted that the Formica #140, its containers and labels would comply with all applicable laws and regulations.

(5) Roberts agreed to "indemnify and hold [Formica] harmless from all losses, costs, expenses, claims and demands caused by or arising out of the manufacture, sale, handling, storage, quality, labeling and use" of Formica #140, "except for losses resulting from the negligence of [Formica]." Roberts further agreed, at its own expense and risk, to provide and undertake the investigation, handling and defense of any such claims.

(6) Roberts agreed to provide and maintain in force insurance coverage, including comprehensive general liability, with minimum limits of liability of $300,000 combined

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[1]Unigard implies in its Petition that Roberts manufactured the adhesive according to Formica's formula. In fact, Roberts was the adhesive expert, and was permitted to use any formula it wished, so long as the finished product performed according to Formica's performance specifications.

bodily injury and property damage, for each occurrence, and $1 million in the aggregate. Such policy was to provide that the insurance is primary, with no recourse to any insurance carried by Formica. In addition, the comprehensive general liability policy was to include Formica and Cyanamid as additional insureds, but only as respects the liability of Roberts arising from the Roberts-Formica contract.

3. Roberts' Insurance Coverage

From October 31, 1973, to the filing of the Smith action in September, 1976, Roberts was insured under a series of comprehensive general liability policies issued to its then parent company, Champion International Corporation ("Champion") by Liberty Mutual Insurance Company ("Liberty Mutual"). The Liberty Mutual policies provided bodily injury liability coverage to Roberts in the amount of $300,000 per occurrence and $300,000 aggregate.

Unigard provided excess coverage to Roberts under its umbrella liability policy with a policy period of October 31, 1973 to October 31, 1976 ("Unigard policy"). The Unigard policy provided coverage to Roberts in the amount of $5 million per occurrence and $5 million aggregate, over the $300,000 limits of the Liberty Mutual policies.

4. The Resolution of the Nebraska Claims

Formica was served with Summons and Complaint in the Smith action on September 9, 1976. Cyanamid was added as a defendant in an Amended Complaint filed August 12, 1977. Roberts was never made a party to the Smith action.

Formica tendered the defense of the Smith action to Roberts. Champion, Roberts parent company, acknowledged the tender of defense and requested evidence that Roberts

had in fact manufactured the adhesive involved in the Smith action. On September 29, 1976, Unigard was placed on notice of the Smith action by Champion's broker. Following an investigation, it was established to the satisfaction of all concerned that the adhesive involved in the Nebraska claims had probably been manufactured and packaged by Roberts. Thereafter, Liberty Mutual (and later, Unigard) retained counsel to defend Formica and Cyanamid in the Smith action.

The Smith action settled on the third day of trial, in July, 1978, for $850,000. Of this amount, Liberty Mutual paid $296,449 (the remaining limits on its $300,000 policy) and Unigard paid $553,551. Shortly thereafter, Unigard paid an additional $80,000 to settle the Ljunggren claims.

PROCEDURAL BACKGROUND

So far as it goes, Formica and Cyanamid adopt Unigard's statement of the procedural background in this case. It should be noted, however, that Unigard did not seek a rehearing in the Ninth Circuit on the issue raised in its Petition for Writ of Certiorari. Indeed, the Petition for Rehearing and Rehearing *En Banc* in the Ninth Circuit did not relate to the summary judgment at all, but to the Ninth Circuit's award of attorneys fees to Formica and Cyanamid.

REASONS FOR DENYING THE WRIT

The question presented by Unigard in its Petition is one which virtually answers itself. Indeed, Formica and Cyanamid do not dispute Unigard's answer to the basic question it poses—a federal court with jurisdiction over an action solely on the basis of diversity of citizenship

may not disregard controlling state case law and instead rely upon inapposite federal interpretations of state law.

The flaw in Unigard's position is not in the logic of its argument, but in the premise upon which the argument is based. Unigard asserts, incorrectly, that the district court and the Ninth Circuit disregarded controlling state case law. In fact, the case law upon which Unigard relies is neither controlling nor apposite.

Even If The California Case Law Upon Which Unigard Relies Were Relevant, It Was Not Binding On The Lower Courts Under Guidelines Established By This Court

Unigard's analysis rests on the decision of the intermediate level California Court of Appeal in *Dart Equip. Corp. v. Mack Trucks, Inc.*, 9 Cal.App.3d 837, 88 Cal.Rptr. 670 (1970) (hrg. denied).[2] Recognizing that the sole state case law upon which it relies is the decision of an intermediate state court, Unigard cites certain language of this Court in *West v. American Telephone & Telegraph Co.*, 311 U.S. 223 (1940), and implies that a federal district court must blindly follow intermediate state court decisions in diversity cases. (Petition for Writ of Certiorari at p. 20.) Unigard conveniently ignores this Court's

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[2]The decision in *Dart*, in turn, rests in part on a decision of the California Supreme Court, *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage, Etc. Co.*, 69 Cal.2d 33, 69 Cal.Rptr. 561, 442 P.2d 641 (1968), in which the court announced, as general rules of contract interpretation, that "the intention of the parties as expressed in the contract is the source of contractual rights and duties" and that parol evidence regarding the parties' intent should not be excluded merely because the language of the contract appears unambiguous on its face. 69 Cal.2d at 38-39, 69 Cal.Rptr. at 564-65, 442 P.2d at 644-45.

comment in *West*, immediately following the quoted language:

> "Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *West v. American Telephone & Telegraph Co., supra*, 311 U.S. at 237.

More recently, this Court has stated the guidelines as follows:

> "[I]n diversity cases this Court has further held that *while the decrees of 'lower state courts' should be 'attributed some weight • • • the decision* [*is*] *not controlling • • •' where the highest court of the state has not spoken on the point.* [Citation omitted]
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> • • •
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> "Thus, under some conditions, federal authority may not be bound even by an intermediate state appellate court ruling.
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> • • •
>
> "This is not a diversity case but the same principle may be applied for the same reasons, viz., the underlying substantive rule involved is based on state law and the State's highest court is the best authority on its own law. *If there be no decision by that court then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court." Commissioner of Internal Revenue v. Estate of Bosch*, 387 U.S. 456, 465 (1967), *quoting Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956). (Emphasis added.)

Based on these guidelines, the Ninth Circuit has held that where a state's highest court has not addressed the issue involved, "substantial deference" must be given "to the district judge's interpretation of the law of the state in which he sits." *Lewis v. Anderson, supra*, 615 F.2d 778, 781 (9th Cir. 1979), *citing United States v. Valley National Bank*, 524 F.2d 199, 201 (9th Cir. 1975).[3]

Applying this Court's guidelines more specifically, the Ninth Circuit in *Lewis* concluded:

> "The California Supreme Court has never faced the issue presented here; we therefore 'sit as a state court' and look for guidance from intermediate appellate courts in California, *and from courts in other jurisdictions which have recently considered the question.*" 615 F.2d at 781. (Emphasis added.)

This is precisely what occurred in the present case. The district court gave due consideration to the decision of the intermediate California appellate court in *Dart*, and concluded that *Dart* was not controlling. The court then looked to the decisions of the Ninth Circuit and other jurisdictions in trying to determine how the California Supreme Court would decide the issue. The Ninth Circuit, in turn, gave the district court's decision the deference

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[3]Because the district judge's interpretation of the law of the state in which he sits is entitled to deference, "[t]he district court's determination will be accepted on review unless shown to be 'clearly wrong.'" *Clark v. Musick*, 623 F.2d 89, 91 (9th Cir. 1980); *accord, Airlift International, Inc. v. McDonnell Douglas Corp.*, 685 F.2d 267 (9th Cir. 1982). Similarly, where the issue presented is one of state law, this Court ordinarily accepts the determination of such state law by the court of appeal. *Commissioner of Internal Revenue v. Estate of Bosch, supra*, 387 U.S. 456, 462 (1967).

which it was due, and in the process cited additional California case law in support of the district court's decision.*

Thus, even if Unigard were correct in its assertion that *Dart* is *apposite, Dart* was not *controlling,* i.e., not binding on either the district court or the Ninth Circuit. It follows that neither the district court nor the Ninth Circuit departed from the standards established by this court in *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938) and its progeny. On the contrary, the lower courts did an admirable job of ascertaining and applying California law in a situation which had never been addressed by the California courts.

The California Case Law Upon Which Unigard Relies Is Not Apposite, And, Accordingly, The District Court And The Ninth Circuit Acted Properly In Relying On Previous Decisions Of The Ninth Circuit And Other Jurisdictions In Ascertaining California Law

Unigard policy definition 1(b) includes as an "assured"

> "any person, organization, trustee or estate to whom the Named Assured [Roberts] is obligated by virtue of a written contract or agreement to provide insurance such as is afforded by this policy. . . ."

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*Unigard cites *Six Companies of California v. Joint Highway District #13,* 311 U.S. 180 (1940) in support of its argument that the lower courts improperly failed to apply controlling California case law. Unigard's reliance on *Six Companies* is misplaced, however. In *Six Companies,* the Circuit Court of Appeals had expressly recognized that the intermediate state court decision was controlling, but refused to follow that controlling authority because it felt the decision was wrong. This Court reversed.

By contrast, in the present case, the district court expressly concluded that the decision of the intermediate state appellate court in *Dart* was inapposite. (See Appendix E to the Petition for Certiorari.) Thus, the lower courts in the present case did not ignore controlling state law in favor of some other rule of decision.

Unigard argues that this clause cannot be interpreted without first referring to the Roberts-Formica contract to determine the scope of coverage which Roberts intended to provide to Formica. In contrast, Formica asserts that the Roberts-Formica contract need only be consulted to determine if Roberts had an obligation to provide to Formica comprehensive liability insurance (i.e., the type of insurance "such as is afforded by [Unigard's] policy"). Once that fact is confirmed (and it is not in dispute in this case), California law requires that the actual scope of Unigard's coverage be determined by the terms of its own policy, and not by reference to the underlying Roberts-Formica contract to which Unigard was not a party.

Initially, Unigard argues that the legal effect of definition 1(b) is to incorporate into the policy the terms of the Roberts-Formica contract. No authority is cited for this proposition, for the simple reason that no authority exists. While it is clear that one contract can incorporate the terms of another, it is equally clear that the Unigard policy does not meet the prerequisites under California law for such an incorporation by reference.

In *Bell v. Rio Grande Oil Co.*, 23 Cal.App.2d 436, 73 P.2d 662 (1937) (hrg. denied), the court of appeal stated:

> "A written agreement may, *by reference expressly made thereto*, incorporate other written agreements; and in the event such incorporation is made, the original agreement and those referred to must be considered and construed as one." 23 Cal.App.2d at 440, 73 P.2d at 663. (Emphasis added.)

This requirement that the document to be incorporated be referenced expressly was elaborated upon in *Scott's Valley Fruit Exchange v. Growers Refrigeration Co.*, 81 Cal.App.2d 437, 184 P.2d 183 (1947), in which it was stated:

> "For the terms of another document to be incorporated into the document executed by the parties *the reference must be clear and unequivocal,* the reference must be called to the attention of the other party and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties." 81 Cal.App.2d at 447, 184 P.2d at 189. (Emphasis added.)

Accord, Williams Construction Co. v. Standard-Pacific Corp., 254 Cal.App.2d 442, 61 Cal.Rptr. 912 (1967).

Clearly, Unigard policy definition 1(b) does not meet this test. The reference in the Unigard policy to "a written contract or agreement" is certainly not sufficiently "express" or "clear and unequivocal" to accomplish an incorporation by reference of the Roberts-Formica contract under the standards set forth above.

Nevertheless, Unigard argues that resort to the underlying Roberts-Formica contract to determine the scope of Unigard's coverage is mandated by the California Court of Appeal decision in *Dart Equip. Corp. v. Mack Trucks, Inc., supra,* 9 Cal.App.3d 837, 88 Cal.Rptr. 670 (1970) (hrg. denied). In fact, the district court correctly concluded that *Dart* is distinguishable and is not dispositive of the present case.

In *Dart*, the named insured, Dart, leased trucks from Mack. Mack requested that Dart obtain insurance coverage to protect Mack from liability for the negligent use of the vehicles leased to Dart. Dart contacted its insurance carrier

and requested that Mack be added to Dart's policy as an additional insured for secondary liability arising out of Dart's use of the vehicles. A certificate of insurance was issued by the insurance company, providing that Mack " 'is hereby made an additional insured but only as respects liability arising out of the use of automobiles in the business of the named insured [Dart], by the named insured, his employees or agents.' " 9 Cal.App.3d at 843, 88 Cal.Rptr. at 674.

Thereafter, a Dart employee was injured while using a Mack truck, and it was determined at trial that the cause of the accident was a defective steering apparatus in the Mack truck. Liability was imposed on Mack based on manufacturer's strict products liability.

Despite Mack's previous request that Dart obtain insurance to protect Mack from liability for Dart's negligent use of the trucks, Mack argued that the policy obtained by Dart also insured Mack for its manufacturer's strict liability. The issue before the court did not relate to the scope of coverage, but to whether coverage existed at all for products liability. Thus, the key issue in the present case (i.e., the *scope* of coverage) was not even raised in *Dart*.

The policy in *Dart* was not clear on its face as to whether coverage was afforded for products liability and the court was therefore forced to examine the underlying contract between Dart and Mack to determine if Dart was obligated to provide that particular *type* of coverage, i.e., products liability coverage.

In the present case, this is analogous to looking to the Roberts-Formica contract to determine if Roberts was obligated to provide to Formica and Cyanamid the type of insurance afforded by the Unigard policy, i.e., compre-

hensive general liability insurance. Formica and Cyanamid have never disputed that the Roberts-Formica contract must be consulted for that limited purpose. This is because it is impossible from the mere language of the Unigard policy to tell if Formica and Cyanamid are insureds. Thus, reference to the underlying contract is necessary to determine if Formica and Cyanamid are insured for comprehensive general liability. It is not necessary, however, to consult the Roberts-Formica contract to determine the scope of Unigard's coverage. The Unigard policy itself clearly and unambiguously defines the scope of coverage.

In short, therefore, *Dart* stands for the proposition that an underlying contract between two insureds can be consulted to determine the *existence* of an obligation to provide a certain type of insurance; it does not permit reference to the underlying contract to determine the *extent* or *scope* of the insurance provided.

Moreover, even if *Dart* was relevant to the issue in the present case, it should be viewed as an aberration, and limited to its own facts. This is because it involved a situation where application of the language of the policy in Mack's favor would have resulted in an absurdity. That is, under Mack's interpretation, the lessee of the vehicle would be providing insurance to the manufacturer for the manufacturer's products liability. Indeed, in at least one later California case, the court recognized that the *Dart* court was trying to avoid an absurd result. *See Charles D. Warner & Sons, Inc. v. Seilon, Inc.*, 37 Cal.App.3d 612, 620-21, 112 Cal.Rptr. 425, 430-31 (1974) ("[W]e believe the holding in Dart is limited to its particular facts. . . . It would have been a perversion of the agreement to hold that

the lessee should indemnify the lessor for the latter's wrongdoing.") Thus, the *Dart* court did nothing more than follow the dictates of § 1638 of the California Civil Code, which provides that "[t]he language of a contract is to govern its interpretation, if the language is clear and explicit, and *does not involve an absurdity.*" (Emphasis added.)

In the more specific context of insurance coverage, the *Dart* decision can be viewed as an application of the well-established rule that "when the strict enforcement of a provision of an insurance policy will result in unreasonable and unjust forfeitures or an absurd result, the courts will refuse to enforce the strict meaning of the language of the policy." *Schilk v. Benefit Trust Life Insurance Co.*, 273 Cal.App.2d 302, 307, 78 Cal.Rptr. 60, 64 (1969) (hrg. denied).

Finally, *Dart* is not controlling even if Unigard's reading of the case were correct. In *Dart,* there was a specific certificate of insurance by which Mack was added to Dart's policy. Thus, Dart and its insurer could conceivably have had some intent, at the time the certificate of insurance was issued, as to the scope of the coverage to be afforded to Mack. By contrast, the status of Formica and Cyanamid as insureds under the Unigard policy was not the result of a negotiated endorsement or certificate of insurance; rather, Formica and Cyanamid are insured by virtue of a standard form definition found in all Unigard policies of this type and vintage. No special request was made by Roberts to include Formica and Cyanamid as insureds.

In other words, this case does not involve a negotiated contract provision designed to meet the specific needs of the named insured, but a standard provision in an adhesion contract, as to which the insured's intent (if any) is irrelevant.[5] Thus, *Dart* is distinguishable and the general rule of interpretation announced in *Thomas Drayage, supra,* does not apply.[6] Indeed, in dealing with the preprinted provisions of an adhesion contract, presented to the insured on a take it or leave it basis, it does not even make sense to speak of the insured's intent.

Instead, this case is controlled by the long accepted principle that any ambiguity in an insurance policy is to be construed strictly against the insurer. *Reserve Insurance Co. v. Pisciotta,* 30 Cal.3d 800, 807-08, 180 Cal.Rptr. 628, 632, 640 P.2d 764, 768 (1982). Thus, as the Ninth Circuit observed in this case, " 'so long as coverage is available under any reasonable interpretation of an ambiguous clause, the insurer cannot escape liability.' " (Appendix A to Petition for Writ of Certiorari, citing *State Farm Mu-*

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[5]In connection with the summary judgment motion in the present case, no evidence was presented as to Unigard's intent in issuing the policy. In any event, "[w]hile extrinsic evidence is sometimes permissible to 'determine the meaning the *parties* gave to the words' of a written agreement [citation omitted], an undisclosed unilateral intent of the insurer of an insurance contract will be deemed 'immaterial' [citations omitted]." *City of Mill Valley v. Transamerica Ins. Co.,* 98 Cal.App.3d 595, 603, 159 Cal.Rptr. 635, 639 (1979) (hrg. denied). (Emphasis in orginal.)

[6]Unigard points out that the rule of the *Thomas Drayage* case applies to insurance contracts, citing *Diamond v. Insurance Co. of North America,* 267 Cal.App.2d 415, 72 Cal.Rptr. 862 (1968). Significantly, *Diamond,* like *Dart,* involved the interpretation of a specially requested endorsement, as to which the insured could have some relevant intent.

tual Automobile Insurance Co. v. Jacober, 10 Cal.3d 193, 197, 110 Cal.Rptr. 1, 3, 514 P.2d 953, 954 (1973).)[7]

Under these circumstances, therefor, it was proper for the district court to conclude that *Dart* is inapposite, and to reach its own conclusion as to how the California Supreme Court would decide the issue. In so doing, the district court was entitled to look to analogous California authority, as well as to the decisions of the Ninth Circuit and other courts which have considered the issue. This is precisely what the district court did, and its interpretation of California law is entitled to deference. *Lewis v. Anderson, supra,* 615 F.2d 778, 781 (9th Cir. 1979). As established below, the district court and the Ninth Circuit, after correctly ascertaining the applicable California law, properly determined that Formica and Cyanamid were entitled to summary judgment.

Based On The District Court's Determination Of The Applicable California Law, The District Court Properly Granted, And The Ninth Circuit Properly Affirmed, The Summary Judgment In Favor Of Formica And Cyanamid

As noted above, Unigard asserts that the rights and duties of Formica and Cyanamid under the Unigard policy

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[7]It should be noted that neither the district court nor the Ninth Circuit found the Unigard policy to be ambiguous. The district court found it to be quite clear. (Appendix E, p. A-12, Petition for Writ of Certiorari.) The Ninth Circuit held that even if the policy were susceptible of more than one interpretation, the district court's interpretation was reasonable, and therefore proper, under California law relating to the interpretation of ambiguous insurance policies. (Appendix A, p. A-2, Petition for Writ of Certiorari.)

cannot be determined without interpreting the Roberts-Formica contract.[8] In fact, Unigard policy definition 1(b)

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[8]It is significant that even if Unigard was correct in its assertion that the Roberts-Formica contract must be interpreted, its interpretation of the contract is wrong. With respect to the interpretation of the contract, Unigard continues to make the same mistake before this Court that it made before the lower courts—it confuses Roberts' duty to indemnify (which did not include the duty to indemnify Formica for its own negligence), with Roberts' duty to purchase insurance for Formica and Cyanamid.

Roberts was required to provide insurance to Formica and Cyanamid "as respects the liability of [Roberts] arising from [the Roberts-Formica contract]." As the manufacturer of Formica #140, Roberts' liability for the product was all-inclusive. Under the California law of strict products liability, Roberts, as manufacturer, would have liability even for those accidents which allegedly were caused by Formica's negligence. *Vandermark v. Ford Motor Co.*, 61 Cal.2d 256, 261, 37 Cal.Rptr. 896, 898-99, 391 P.2d 168, 170-71 (1964) ("Since the liability is strict it encompasses defects regardless of their source, and therefore a manufacturer of a completed product cannot escape liability by tracing the defect to a component part supplied by another. . . . These rules focus responsibility for defects, whether negligently or nonnegligently caused, on the manufacturer of the completed product, and they apply regardless of what part of the manufacturing process the manufacturer chooses to delegate to third parties.").

Thus, while Roberts did not agree to indemnify Formica for its own negligence, it did agree to provide insurance for any negligence by Formica and Cyanamid. Accordingly, Formica and Cyanamid were entitled to summary judgment on the insurance coverage issue even if the interpretation of the policy required interpretation of the Roberts-Formica contract.

Moreover, Unigard mischaracterizes the district court and Ninth Circuit decisions as holding that Formica and Cyanamid are additional insureds under the Unigard policy *for all purposes*. (Petition for Writ of Certiorari, at p. 18.) In fact, respondents never contended (and the lower courts never held) that Formica and Cyanamid were insured for all purposes, but only in connection with the manufacture, sale, handling, storage, quality, labeling and use of Formica #140.

is clear on its face, and can be interpreted with nothing more than a reference to the Roberts-Formica contract to determine that Roberts was in fact obligated to provide general liability insurance to Formica. Accordingly, the interpretive rules which Unigard seeks to rely upon are inapposite and do not answer the question in this case.

Regarding the use of extrinsic evidence to interpret an insurance policy, Couch on Insurance states the general principle as follows:

> "Since all prior negotiations are assumed to be merged in the written contract, the policy itself constitutes the contract between the parties, and if the meaning of the terms of the policy, considered as an entirety, is clear, it alone, in the absence of fraud, accident or mistake, must be looked to in construction. Under such conditions, the court has no right to do more than declare what the plain wording of the contract imports; extrinsic evidence is inadmissible to vary or control the terms of the contract, and the policy will be enforced, if at all, as written.
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> "A contract different from that made by the parties cannot be read into the policy from the surrounding circumstances, such as the conduct of the parties, to give it either a more extensive or a more limited meaning than that expressed therein." 1 Couch on Insurance 2d, § 15:56 at pp. 746-50. (Footnotes omitted.)[9]

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[9]*See also* 1 Couch on Insurance 2d, § 15:69 at pp. 766-68 (footnotes omitted). ("When the contract is clear, precise and unambiguous in its terms, and the sense is manifest and leads to nothing absurd, there is no proper scope for a resort to rules of construction, even to give effect to the policy. If the express terms and language that the parties have used is not ambiguous or uncertain, it should be given effect as written.")

This rule has been consistently followed in California. *See, e.g., McMillan v. State Farm Ins. Co.*, 211 Cal.App.2d 58, 27 Cal.Rptr. 125 (1962); *Jarrett v. Allstate Ins. Co.*, 209 Cal.App.2d 804, 26 Cal.Rptr. 231 (1962). As stated in *Fullerton v. Houston Fire and Casualty Ins. Co.*, 234 Cal. App.2d 743, 747 44 Cal.Rptr. 711, 714 (1965) (hrg. denied): "While the intentions of an insured and his company are not to be disregarded, mere intent cannot overcome the objective provisions of an insurance policy as actually issued." Given this straightforward rule of interpretation, it is clear that Unigard's attempt to limit its coverage by reference to the Roberts-Formica contract must be rejected.

As found by the district court, the most relevant case authority in the present situation is the decision in *Price v. Zim Israel Navigation Co., Ltd.*, 616 F.2d 422 (9th Cir. 1980), in which the Ninth Circuit applied California law. (See Appendix E to the Petition for Writ of Certiorari.) In *Price*, ship owner Zim and stevedoring company ITS entered into a contract for unloading vessels. Among other things, the contract required that Zim would be named as co-insured under ITS's liability insurance policies. After the contract took effect, ITS purchased a comprehensive liability policy from Tokio Marine and Fire Insurance Co. Subsequently, Zim was added to the Tokio policy "'as an additional insured as respects operations performed for Zim. . . .'" 616 F.2d at 425.

The following year, Zim and ITS modified their contract by eliminating the provision which required ITS to have Zim named as a co-insured, but the endorsement adding Zim to the Tokio policy was not explicitly cancelled.

Subsequently, an employee of ITS, who was injured while working on a Zim vessel, sued Zim for negligence and strict liability. Zim tendered the defense to Tokio, which refused to defend. One ground for the refusal was Tokio's contention that the cancellation of the underlying contractual obligation of ITS to insure Zim had the effect of also cancelling the endorsement on the Tokio policy which added Zim as an insured. In other words, Tokio took the same position which Unigard takes in this case, that the coverage obligation expressed in its policy was limited by the named insured's contractual obligation in the underlying contract.

The Ninth Circuit rejected that argument, holding that under the terms of the insurance policy, including the Zim endorsement, Tokio was obligated to assume responsibility for the suit against Zim. As succinctly stated by the court:

> "Tokio's obligations were governed by the insurance policy which it issued, not by the stevedoring contract to which it was not a party." 616 F.2d at 428.

The same result should obtain in the present suit. Unigard was not a party to the Roberts-Formica contract and its obligations must accordingly be governed by the terms of its policy.

A particularly apropos formulation of the Ninth Circuit's conclusion in *Price* is contained in 11 Couch on Insurance 2d (Rev. ed.), which states as follows:

> "The fact that two or more persons are named as the insureds in a given policy does not alter the basic principle that the liability of the insurer is measured by the terms of its contract. Likewise, *the fact that there is an agreement between the insureds which is narrower in scope than the terms of the contract of insurance does*

not detract from the insurer's liability." § 44:255 at p. 399. (Emphasis added.)

This rule, set forth in Couch, was based on the decision in *Sears, Roebuck & Co. v. Hartford Accident & Indemnity Co.*, 50 Wash.2d 443, 313 P.2d 347 (1957). In that case, Sears was the owner of a retail store and adjoining parking lots. One of the parking lots was bordered by a sidewalk and a two-foot strip of land owned by the city. Sears entered into a license agreement with concessionaire Rockey under which Rockey was to locate his business on this parking lot and sell his products.

As a part of the agreement, Rocky was to keep the lot and adjoining city land free of debris and trash occasioned by his operations or by the presence of his customers. Rockey also agreed to:

> "... hold harmless First Party [Sears] from any claim, action, loss, or damage that may arise by reason of [Rockey's] occupancy of said space or the operation of [Rockey's] business or the act or carelessness of patrons of [Rockey] in said area. *And to that end,* [Rockey] shall obtain and maintain in full force and effect policies of insurance in such amounts as [Sears] shall approve in writing. [Rockey] shall obtain particularly policies of insurance for public liability and food liability." 313 P.2d at 348. (Emphasis added.)[10]

Rockey purchased an insurance policy from Hartford, naming both Rockey and Sears as insureds with respect to, among other things, premises liability.

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[10]Note that in contrast to the Roberts-Formica contract in the present case, the indemnity and insurance provisions of the Rockey-Sears contract were expressly made interdependent (i.e., "[a]nd to that end"). *See* footnote 8, *supra.*

Subsequently, Rockey sought and obtained permission from Sears to make permanent water and sewage connections to the city water system. The connections required tearing up the sidewalk and blacktop in the two-foot strip of city-owned land adjacent to the parking lot. After the work was completed, a small hole or dip was left in the blacktop. A Sears customer tripped and fell in or near the hole, and subsequently sued Sears. Sears ultimately settled the suit and then sued Hartford for reimbursement under the policy.

The first question confronting the court was whether the policy covered the injury to Sears' customer, since she was not on the premises for any purpose benefitting Rockey or in any way connected with his business. As noted above, the Rockey-Sears agreement required Rockey to indemnify Sears only for claims arising from Rockey's occupancy of the premises or the operation of Rockey's business or the carelessness of Rockey's patrons, and to obtain insurance to that end.[11]

Hartford sought to limit its coverage, based on the underlying contractual agreement between Rockey and Sears. As stated by the court: "Hartford would have us read the policy in light of the Rockey-Sears license." 313 P.2d at 350.

The court went on to note that the coverage under the Hartford policy was broader than that required by the

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[11]It was never established that the hole actually resulted from Rockey's excavation or that the hole actually occasioned the customer's fall. Had this been established, the accident would have fallen squarely within Rockey's contractual obligations to indemnify Sears for losses arising from the operation of his business and to obtain insurance "to that end."

Rockey-Sears contract and that Hartford "could have defined and limited the coverage it intended to give to Sears, but did not do so." 313 P.2d at 350.

Finally, the court resolved the coverage question as follows:

> "That Sears received a greater coverage than Rockey was obligated to furnish, and than Hartford intended to give, is not a matter with which we are here concerned. Since an insurance policy is merely a written contract between an insurer and the insured, courts cannot rule out of the contract any language which the parties thereto have put into it; cannot revise the contract under the theory of construing it; and neither abstract justice nor any rule of construction can create a contract for the parties which they did not make for themselves." 313 P.2d at 350.

Thus, while Unigard would like to limit the status of Formica and Cyanamid as additional insureds through a restrictive (and unreasonable) interpretation of the Roberts-Formica contract, the decisions in *Price* and *Sears* compel the conclusion that Unigard should be held to the clear and unambiguous language of its policy. Accordingly, the district court properly concluded that Formica and Cyanamid were entitled to summary judgment.

The decision in *Gulf Oil Corp. v. Mobile Drilling Barge or Vessel,* 441 F.Supp. 1 (E.D.La. 1975), *aff'd per curiam,* 565 F.2d 958 (5th Cir. 1978), also supports the district court's conclusion. In the *Gulf* case, Shell Oil Company and ODECO contracted with respect to ODECO's drilling of a relief oil well to assist in fighting a fire on a nearby Shell Oil platform. In the process of drilling, ODECO's barge

damaged Gulf Oil's pipeline and Gulf sued Shell and ODECO. After the execution of the contract, but before the accident, Shell and ODECO amended the contract to provide that Shell would be an additional insured under ODECO's insurance policies. After the accident, Shell stipulated that ODECO was without fault and agreed to indemnify ODECO for any loss arising out of the accident.

ODECO's policy with Highland's Insurance Company contained a provision quite similar to definition 1(b) of the Unigard policy. The Highland's policy stated:

> "'*The unqualified word "Insured"* wherever used, *includes* the Named Insured and also *any* person or *organization to whom* or to which *the Named Insured is obligated by virtue of a written contract to provide insurance such as is afforded by this policy,* but only with respect to operations by or in behalf of or facilities used by the Named Insured.'" 441 F.Supp. at 6. (Emphasis added.)

Highlands argued that under this provision, Shell was an insured, not for its own negligence, but only for claims arising out of the negligence of ODECO, and that because Shell had previously stipulated that ODECO was without fault, no coverage was provided. (Similarly, Unigard interprets the comparable provision of its policy as not insuring Formica and Cyanamid for their own negligence.)

Shell argued that

> "the cited language merely limits coverage to damages incurred while Shell and ODECO were performing their respective obligations under the . . . drilling contract, regardless of who was at fault." 441 F.Supp. at 6.

(Similarly, Formica and Cynamid contend that they are insured under the plain language of the Unigard policy for any injuries or damages resulting from the manufacture, sale, handling, storage, quality, labeling and use of Formica #140, regardless of who is at fault.)

The court in *Gulf* upheld Shell's position, noting that (as in the present case):

> "the policy contains no express exclusion of coverage for damages arising out of the sole negligence of the additional insured. *Had it been the intent of all parties to the contract to exclude coverage for damages arising out of Shell's sole negligence, it would have been simple to express this intent clearly in the policy.*" 441 F.Supp. at 7. (Emphasis added.)

Similarly, in the present case, if Unigard had wanted to limit its coverage for additional insureds, it could easily have done so by including in its definition 1(b) any of a number of limiting statements such as those set out in brackets below:

> [and then only to the extent of the Named Assured's contractual obligation to provide such insurance.]
>
> [and then only to the extent the Named Assured is contractually obligated to indemnify such person, organization, trustee or estate.]
>
> [and then only if such person, organization, trustee or estate is not negligent.]

Like the carrier in *Gulf*, Unigard failed to include such a limitation in its policy, and it would violate the most basic California rules of insurance construction "to read into the policy words that are not there." *VanDerhoof v. Chambon*, 121 Cal.App. 118, 131, 8 P.2d 925, 930-31 (1932) (hrg. denied).

CONCLUSION

A thorough examination of the authorities discussed above makes it clear that the single California Court of Appeal decision upon which Unigard relies does not establish the controlling rule of decision under the undisputed facts in this case. Instead, this case was properly decided on the basis of the courts' decisions in *Price, Sears* and *Gulf*.

More importantly, with respect to the question initially posed by Unigard, it is clear that the district court properly ascertained how the California Supreme Court would decide the case, and applied the law as so found. The Ninth Circuit, in turn, properly accorded the district court decision the deference to which it was entitled.

It follows, therefore, that there was no departure from this Court's guidelines in the handling of this case by the lower courts, and that the Petition for Writ of Certiorari should be denied.

DATED: March 14, 1984

Respectfully submitted,

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AFFIDAVIT OF SERVICE

I, Jerome I. Braun, being duly sworn, state as follows:

I am a citizen of the United States and am a member of the Bar of the United States Supreme Court. I am over the age of eighteen years and not a party to the within above-entitled action. My business address is 235 Montgomery Street, Suite 3000, San Francisco, California. On this date I served the Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, by placing three true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at San Francisco, California, addressed in the manner set forth below.

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Dated: March 14, 1984

JEROME I. BRAUN

JEROME I. BRAUN

STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO } ss.

On this 14th day of March, 1984, before me Stephen E. Cone, Notary Public in and for the State of California, personally appeared Jerome I. Braun, known to me to be the person whose name is subscribed to this instrument, and acknowledged that he executed it.

STEPHEN E. CONE

STEPHEN E. CONE

OFFICIAL SEAL
STEPHEN E. CONE
NOTARY PUBLIC — CALIFORNIA
City and County of San Francisco
My Commission Expires May 15, 1987